

**COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. BFA-24059-043
PERMIT NO. 836-5060
NONCOMPLIANCE NO. 41-1434
FAILURE TO ABATE CESSATION ORDER NO. 04-1157**

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET,

PLAINTIFF,

FINAL ORDER

VS.

WHITE CLOUD MINING CO., INC., and
HOBART W. ANDERSON

DEFENDANTS.

* * * * *

THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer. Having considered the Hearing Officer's Report and Recommendation and any exceptions and responses thereto, and being otherwise sufficiently advised, it is hereby ORDERED AND ADJUDGED as follows:

1. The Hearing Officer's Report and Recommendation filed on //S// 7/6/01, is hereby incorporated by reference as if fully stated herein. The recommended Findings of Facts and Conclusions of Law set out in the Hearing Officer's Report are ADOPTED by reference as the Findings of Fact and Conclusions of Law for this Final Order.

2. Defendant White Cloud Mining Co., Inc., ("White Cloud") has WAIVED its right to an administrative hearing concerning this matter.

3. As evidenced by the final order of the Secretary entered on November 23, 1998, in PAC-24059, White Cloud violated Kentucky's surface mining laws as cited in Notice of Noncompliance 411434 and Cessation Order 04-1157 and has not abated those violations on Permit 836-5060.

4. The following performance bonds, having a total remaining encumbered balance of \$38,800, are FORFEITED.

(a) Letter of Credit 00433 for \$14,800 issued by the First Commonwealth Bank of Prestonsburg, Kentucky ("Bank"); and,

(b) Letter of Credit 00473 for \$24,000 issued by the Bank;

5. As evidenced by the final order of the Secretary entered on November 23, 1998, in PAC-24059, White Cloud is INELIGIBLE to receive another coal mining permit or begin future mining operations in Kentucky until it has complied with the requirements of Kentucky's surface mining laws and KRS 350.130.

6. As evidenced by the final order of the Secretary entered on November 23, 1998, in PAC-24059, White Cloud SHALL ABATE the violations cited in the Notice of Noncompliance and Cessation Order listed above, reclaim the permit to permanent program standards, and achieve the post mining land use as approved in the permit.

7. This is a FINAL and APPEALABLE Order.

APPEAL RIGHTS

In accordance with the provisions of KRS 350.0305 and KRS 350.032, any person or party aggrieved by a Final Order of the Secretary resulting from a hearing may obtain a review of the Final Order by filing in Circuit Court a Petition for Review. Such petition must be filed within thirty (30) days after the entry or rendition of the Final Order, and a copy of the Petition must be served upon the Cabinet.

ENTERED this the _____ day of _____, 20__.

//S// 8/8/01
JAMES E. BICKFORD, SECRETARY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing FINAL ORDER was, on this ____ day of _____, 20 ____, mailed by first-class mail, postage prepaid to:

WHITE CLOUD MINING CO INC
PO BOX 905
FLATWOODS KY 41139

HOBERT ANDERSON
PO BOX 905
FLATWOODS KY 41139

FIRST COMMONWEALTH BANK
OF PRESTONSBURG
BURL WELLS SPURLOCK AGENT
311 N ARNOLD AVENUE
PRESTONSBURG KY 41653

and hand-delivered to:

HON. LAURA HUNTER
Office of Legal Services
Natural Resources and Environmental
Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

DOCKET COORDINATOR

Distribution:

DIVISION OF FIELD SERVICES/BFA
PRESTONSBURG REGIONAL OFFICE
HEARING OFFICER, VM
ORDER FILE

**COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. BFA-24059-043
PERMIT NO. 836-5060
NONCOMPLIANCE NO. 41-1434
FAILURE TO ABATE CESSATION ORDER NO. 04-1157**

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET,

PLAINTIFF,

HEARING OFFICER'S REPORT AND RECOMMENDATION

VS.

WHITE CLOUD MINING CO., INC., and
HOBART W. ANDERSON

DEFENDANTS.

* * * * *

I. SUMMARY OF PROCEEDINGS

Nature of Case: Coal mining enforcement action for bond forfeiture.

Hearing Date: Submitted May 2, 2001 on Motion for Summary Disposition and Default filed by the Cabinet.

Appearances: Hon. Laura Hunter for Cabinet;
White Cloud Mining Co., Inc. ("White Cloud") did not appear;
Mr. Hobart Anderson appeared on his own behalf.

Hearing Officer: Hon. Vanessa Mullins Dickson.

Issues Summary: Whether White Cloud should be held in default for failure to appear, and whether bond forfeiture should be granted.

Recommendations: White Cloud should be found in default and the Cabinet should be granted the relief it requested. The Secretary should find that White Cloud failed to abate the previously affirmed violations, determine White Cloud ineligible to receive another permit or begin another operation until the requirements of KRS 350.130 are met, forfeit the performance bonds and order White Cloud to abate the violations and achieve the post mining land use.

* * * * *

II. FINDINGS OF FACT / PROCEDURAL HISTORY/ CONCLUSIONS OF LAW

Based upon the record of this matter, the Hearing Officer hereby makes the following Findings of Fact and Conclusions of Law.

1. On August 5, 1999, the Natural Resources and Environmental Protection Cabinet filed an Administrative Complaint against White Cloud concerning violations on Permit No. 836-5060. The Cabinet's Administrative Complaint sought a bond forfeiture on the basis of a violation previously affirmed in a Secretary's Final Order entered on November 23, 1998, in file PAC-24059 regarding Notice of Non-Compliance 41-1434 and Cessation Order 04-1157. The violation cited was failure to begin final reclamation thirty days after the permit expired (in 1993) under 405 KAR 16:020. The Administrative Complaint alleged that the violation had not been abated.

2. The Administrative Complaint also alleged that White Cloud as principal posted the following performance bonds having a total remaining encumbered balance of \$38,800:

- (a) Letter of Credit 00433 for \$14,800 issued by the First Commonwealth Bank of Prestonsburg, Kentucky ("Bank"); and,
- (b) Letter of Credit 00473 for \$24,000 issued by the Bank;

3. As evidenced by the return receipt cards (green cards), the Administrative Complaint, Summons and Order setting prehearing conference were sent to White Cloud by certified mail, postage prepaid and return receipt requested to White Cloud's address. White Cloud accepted service of the documents on August 24, 1999, as indicated on the return receipt card. The Amended Complaint was sent to the same address. Based on the foregoing, I conclude that the Administrative Complaint, Summons and Order and Amended Complaint were properly served

in accordance with 405 KAR 7:091, Section 5(1)(c). An Order was entered rescheduling the conference for October 18, 1999.

4. On September 20, 1999, Hobart Anderson filed a Motion to Intervene in this matter, stating that he was an officer of White Cloud and had an interest that may be adversely affected by this matter. On December 9, 1999, the motion to intervene was granted.

5. A Prehearing Conference was held October 18, 1999. The Cabinet was represented at the hearing. White Cloud failed to appear. Since White Cloud did not appear, the Cabinet requested that the Hearing Officer enter an Order for Defendant to appear and show cause as to why it should not be held in default.

6. On October 20, 1999, a Show Cause Order was entered and served ordering White Cloud to appear on November 15, 1999, and show cause why it should not be deemed to have waived its right to an administrative hearing. The Order Directing Defendants to Appear and Show Cause was properly served on the Defendant in conformity with the Cabinet's regulation governing service of documents or other pleadings. 400 KAR 1:030, Section 2.

7. On November 15, 1999, a Show Cause Hearing was held. The Cabinet was represented by the Hon. Laura Hunter. No appearance was made on behalf of the Defendant White Cloud to show cause why it should not be deemed to have waived its right to a hearing under 405 KAR 7:092, Section 5(5). Hobart Anderson appeared on his own behalf and adequately demonstrated the basis for his failure to appear in this matter. He also filed a response to the Cabinet's Administrative Complaint.

8. Pursuant to 405 KAR 7:092, Section 5, if an order to show cause is not satisfied as required, the Hearing Officer shall recommend to the Secretary the entry of a final order in

conformity with the relief requested by the Cabinet in its Administrative Complaint. Under the provisions of 405 KAR 7:092, Section 5(5), White Cloud has admitted the allegations made by the Cabinet in its Administrative Complaint and failed to demonstrate why a Secretary's Order adverse to its interests should not be entered in accordance with the provisions of 405 KAR 7:092 granting the Cabinet the relief it requested in its Administrative Complaint.

9. This matter was rescheduled repeatedly at the unopposed request of the parties, in an attempt to resolve the matter by agreement.

10. At a prehearing conference held February 22, 2001, the Cabinet stated that it wished to file a Motion for Summary Disposition. An Order was entered February 28, 2001, setting a briefing schedule in this matter. Following submission of briefs and responses by the Cabinet and Mr. Anderson, this matter was submitted for decision on May 2, 2001.

11. Under the regulations, summary disposition is appropriate if there are no disputed facts and one party is entitled to judgement as a matter of law.

12. The factual allegations supporting the Cabinet's motion are undisputed. The parties do not dispute that the Secretary has already affirmed the subject violation by prior Secretary's Final Order, which is no longer subject to challenge. Further, the parties do not dispute that the cited violation has not been abated. When a violation remains unabated, the regulations at 405 KAR 10:050, §3 require that a bond be forfeited:

- (1) A bond for a permit area or increment shall be forfeited, if the cabinet finds that:....
 - (a) The permittee has failed to conduct the surface mining and reclamation operations in accordance with KRS Chapter 350, the conditions of the permit or Title 405 Chapters 7 through 24 within the time required;

13. Therefore, unless an affirmative defense is established, the Cabinet is entitled to bond forfeiture. Mr. Anderson asserts a number of affirmative defenses. First, he asserts that the last mining was in 1992, and that White Cloud declared bankruptcy in 1992. The Cabinet claims that this bankruptcy has been dismissed. However, even if bankruptcy were pending, this action would not constitute a legal defense to an administrative adjudication of entitlement to bond forfeiture in this case, because actions under a state's enforcement police powers are not stayed by bankruptcy proceedings. In Re Commerce Oil, 847 F.2d 291 (6th Cir. 1988).

14. Another affirmative defense asserted by Mr. Anderson is that the Noncompliance and Cessation Order are being adjudicated in Franklin Circuit Court. In Response, the Cabinet notes that the violations were affirmed by final order entered in PAC-24059-042 on November 23, 1998, and that Order was not appealed to the Franklin Circuit Court within thirty days and thus is no longer subject to challenge. KRS 350.032. Mr. Anderson did not deny that he did not appeal the November, 1998 Order within thirty days. The Franklin Circuit Court action was brought by the Cabinet against White Cloud to enforce the duties established in the unappealable November 1998 Order. Therefore, the Franklin Circuit Court action poses no bar to the administrative adjudication of bond forfeiture sought here. If there are issues still open to determination by the Franklin Circuit Court, the Defendants may appeal this order to that Court and move to consolidate this action with the prior action.

15. Mr. Anderson also asserts as affirmative defenses accord and satisfaction, waiver, estoppel, compromise and settlement. However, assuming that the facts he presents in support of these arguments are true, they are insufficient to support the defenses asserted. In sum, Mr. Anderson recounts that the Cabinet met with him and outlined what he must do to abate the

violation. Mr. Anderson admits that for a variety of reasons he has not completed the work he was advised was necessary for abatement – which is to obtain a new permit to replace the one that has expired. The facts do not constitute a sufficient basis to find accord and satisfaction, waiver, compromise or settlement, because any Cabinet agreement was contingent on Mr. Anderson abating the violation by obtaining the new permit. The facts also do not support the legal defense of estoppel, because Anderson has not shown detrimental reliance on any Cabinet representation.

16. The regulations provide that bond forfeiture is available any time there remain outstanding violations, and Mr. Anderson does not dispute that the violation is not abated. The undisputed fact is that this permit expired in 1993, final reclamation has not been performed, and Mr. Anderson has not obtained an overlapping permit to abate the violation. The Cabinet is entitled to bond forfeiture under the law.

III. RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearing Officer recommends that the Secretary enter the recommended Order, attached and incorporated herein. The Secretary should determine that the violation has not been abated, forfeit the bond, determine White Cloud ineligible to receive another permit or begin another operation until the requirements of KRS 350.130 are met, and order White Cloud to abate the violations and achieve the post mining land use.

IV. EXCEPTIONS AND RESPONSE RIGHTS

Pursuant to KRS 350.0301 any party may file exceptions to this Report and Recommendation within fourteen (14) days of service of this Report. A party may file a

Response to any Exceptions within (21) days of service of this Report. The Secretary will consider this report, exceptions, response and recommended order and decide the case.

SO RECOMMENDED this _____ day of _____, 2001.

//S// 7/6/01 _____
VANESSA MULLINS DICKSON
ENVIRONMENTAL ADMIN. HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 FOUNTAIN PLACE
FRANKFORT, KENTUCKY 40601
(502) 564-7312

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDATION AND FINAL ORDER was, on this _____ day of _____, 2001, mailed by first-class mail, postage prepaid to:

WHITE CLOUD MINING CO INC
PO BOX 905
FLATWOODS KY 41139

HOBERT ANDERSON
PO BOX 905
FLATWOODS KY 41139

FIRST COMMONWEALTH BANK
OF PRESTONSBURG
BURL WELLS SPURLOCK AGENT
311 N ARNOLD AVENUE
PRESTONSBURG KY 41653

and hand-delivered to:

HON. LAURA HUNTER
Office of Legal Services
Natural Resources and Environmental
Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

DOCKET COORDINATOR

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